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No. 48

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

SWITCHMEN'S UNION OF NORTH AMERICA, ET AL., *Petitioners*,

v.

NATIONAL MEDIATION BOARD, GEORGE A. COOK, WILLIAM M. LEISERSON and HARRY H. SCHWARTZ, and BROTHERHOOD OF RAILROAD TRAINMEN, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR THE RESPONDENT BROTHERHOOD OF RAILROAD TRAINMEN.

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OPINIONS BELOW.

The district court rendered no opinion; its findings of fact and conclusions of law are found at R. 76-81. The opinions of the United States Court of Appeals for the District of Columbia (R. 160-193) are reported at 135 F. (2d) 785.

JURISDICTION.

The judgment of the Court of Appeals for the District of Columbia was entered on February 15, 1943. The petition for certiorari was filed April 16, 1943, and granted May 24, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

STATUTE INVOLVED.

The statute involved is the Railway Labor Act, as amended, in 1934 (48 Stat. 1185, 45 U. S. C., Section 151, et seq.). The pertinent provisions of the Act are set forth in the Appendix, *infra*, pp. 27-28-29.

STATEMENT.

Since this is covered in the majority opinion of the Court of Appeals, as well as the brief of the Mediation Board, it is not here repeated, except to correct some inaccuracies in the petitioners' statement.

The Mediation Board announced its findings in somewhat different language than used by the petitioner.

The Board held interalia as follows: (R. p. 46):

> "Note that the Act Speaks of a majority of a craft or class determining "who shall be the representative" (not the representatives). The subjects "craft or class" and "representative" are both given in the singular number.
>
> The Board does not undertake to discuss the relative advantages or disadvantages which may inhere in single or divided representation respectively. Doubtless serious arguments may be made both for and against each method. The Act leaves the Board in no doubt that Congress had in mind single representation for each craft or class on each carrier when enacting it; and that had the Congress thought of sub-divisions of a craft or class or of a carrier as desirable methods of representation it would have made provision for their use.

Finally, the Board concludes as a matter of law that the Railway Labor Act vests the board with no discretion to split a single carrier or combine two or more carriers for the purpose of determining who shall be eligible to vote for a representative of a craft or class of employees under Section 2, Ninth, of the Act, and the argument that it has such power fails to furnish any basis of law for such administrative discretion."

On page 4, petitioners' brief it is stated:

"It was evident therefore that at the outset a majority of all yardmen employed by the New York Central Railroad Company would vote for the Brotherhood."

(this argument being based upon the fact that 3653 yardmen of the 6087 yardmen who were then employed on the New York Central Railroad were covered by Brotherhood contracts). This reasoning pre-supposes that all of the yardmen covered by the Brotherhood contracts were satisfied and none would vote for a change of representation.

QUESTIONS PRESENTED.

This Court in its order granting certiorari in this and three other cases involving the Railway Labor Act, certified four questions for counsel to discuss in their brief and upon oral argument, so far as applicable in each case. The two applicable in this are:

I. What bearing, if any, the Norris-LaGuardia Act has upon the propriety of granting the relief sought.

II. Whether the District Court had jurisdiction to review the certification of the Board.

III. The question presented on its merits is whether under the Railway Labor Act all the yardmen of a single carrier must be treated as members of a single craft or class for the purposes of collective bargaining.

SUMMARY OF ARGUMENT.

I.

The respondent, Brotherhood of Railroad Trainmen, concurs fully with the position taken by the respondent, National Mediation Board as to the bearing, if any, of the Norris-LaGuardia Act upon the relief sought.

II.

No provision is contained in the Railway Labor Act permitting suits to review the decision of the National Mediation Board or to set aside certifications made by the Board. Under the general equity power the court could only interfere with a decision in the event it were arbitrary or capricious and not based on substantial evidence or if not within the jurisdiction of the Board.

III.

After the Board found that the New York Central Railroad Company was operated as a single carrier, it could not as a matter of discretion break down the class or craft of yardmen within this carrier (there being no dispute as to the functional or occupational work of yardmen) into geographical segments or units for the purpose of making separate bargaining units.

(a) The decision of the Board that as a matter of law the craft or class of yardmen within the meaning of the Act was carrier wide is supported by those who favored, as well as those who opposed this provision before the Congressional Committees, and was obviously in line with the policy they wished to adopt.

(b) The petitioners' argument[1] that:

> "The real controversy was between the two organizations, namely, the Brotherhood and Switchmen's Union, with the former contending for a single repre-

[1] Br. p. 9.

> sentation for all yardmen on the New York Central Railroad * * * and the latter for a continuance of representation by separate *parts* of the New York Central Railroad as reflected by the contracts of the two organizations then in effect. * * *" (emphasis ours.)

ignores the obvious fact that under the Railway Labor Act employees can only act through their representative or organization.

(c) There is substantial evidence that yardmen covered by contracts of the Switchmen's Union were disputing the right of that organization to continue to represent them. Aside from the two different instances (R. 123-124) it seems apparent that since there were approximately 3653 yardmen covered by Brotherhood contracts (R. 35) and the Brotherhood presented with the invocation 4,749 signed authorizations to the Mediation Board (R. 35), a substantial number of men covered by Switchmen's contracts desired other representation.

(d) Petitioners' contention on page 10 of their brief that

> "The words which are impliedly omitted in Section 2, Fourth, are the following italicized words 'the majority of any craft or class of employees' *who are involved in a dispute* "shall have the right to determine who shall be the representative of the craft or class for purposes of this Act,"

does not help petitioners' position without adding another far-fetched implication namely, the majority of *a portion of* any craft or class of employees; it is submitted that neither of these two "implications" can be read into Section 2, Fourth, in view of the contrary positive intent that the representation be carrier wide as shown by those who favored as well as those who opposed the 1934 amendments.

(e) In order to determine "who are involved in a dispute" it is necessary to determine what the carrier is: different groups of yardmen included in the carrier, who can-

not agree upon the same representative, are involved in the dispute.

IV.

The petitioners' argument under point IV (Br. 11) that

> "The action of the Board in voting all the yard men of the New York Central Railroad Company to determine a single representation constituted an unlawful limitation upon the 'freedom of association among employees' and unauthorized interference with the right of employees to designate and bargain collectively through represetnatives of their own choosing."

attempts to read into Section 2, Fourth, intended to prevent *Carrier* interference, a limitation that would apply to *groups of yardmen* on a single carrier who could not agree upon single representation.

It is stated by the Petitioners (Br. p. 11):

> "The act intends that groups which have chosen to bargain as units may continue to do so. This interpretation is clearly supported by the decisions of the Courts."

No where in the act is the word "group" used nor has the petitioner cited any cases where the word "group" was interpreted to mean a craft or class less than carrier wide. The cases cited by the petitioners referring to craft or class all deal with employees in a functional rather than geographical scope. In the present case there is no dispute as to the functions of yardmen.

ARGUMENT.

I.

The Application of the Norris-LaGuardia Act to this Case.

The Court has asked the parties to discuss "what bearing, if any, the Norris-LaGuardia Act has on the propriety of granting the relief sought."

The respondent, Brotherhood of Railroad Trainmen, concurs fully with the position taken by the respondent, National Mediation Board, as to the bearing, if any, of the Norris-LaGuardia Act upon the relief sought.

II.

The Jurisdiction of the District Court.

The Court in its order granting certiorari, requested the parties to discuss whether the District Court had jurisdiction to review the certification of the National Mediation Board.

The amended complaint (R. 5), purports to be brought under the Railway Labor Act and also under the general equity jurisdiction of the District Court.

There are no provisions in the Act entitling any party to a review of the decision of the Board, nor is there any provision entitling the petitioners to bring an action setting aside the certification of the Board. The point to be determined, therefore, is whether or not this comes within the general equity jurisdiction of the District Court of the District of Columbia.

It is the position of the petitioners that there are two aspects to the question of the Court's jurisdiction to review the Board's certification, one being whether the certification both as to facts and law, is wholly immune from judicial review and the second being whether the court could exercise its general equity jurisdiction to entertain this particular suit. There seems to be little doubt that the factual finding of the Board is conclusive, provided it is based on a proper hearing, unless the decision of the Board is arbitrary and capricious.[2]

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[2] Brotherhood of Railroad Trainmen v. National Mediation Board, 88 F. (2d) 757 (App. D. C.); National Federation of Railway Workers v. National Mediation Board, 110 F. (2d) 529 (App. D. C.) certiorari denied, 310 U. S. 628; Order of Railway Conductors v. National Mediation Board, 113 F. (2d) 531 (App. D. C.); Brotherhood of Locomotive Firemen and Enginemen v. Kenan, 87 F. (2d) 651 (C. C. A. 5) certiorari denied sub nom Grand Inter-

The case of *Shields* v. *Utah Idaho Central Railroad*, 305 U. S. 177, cited by the petitioners as authority for the proposition that the court has authority to review a determination by the Interstate Commerce Commission, despite the absence of any provision in the Act for review of such determination, is not authority for such proposition. In this case the Mediation Board, through authority conferred on it by Section first of the Act, requested the Interstate Commerce Commission to determine whether the Utah Idaho Central Railroad Company was an interurban electric railway. The Interstate Commerce Commission found that it was not and the Mediation Board therefore ordered the railway to post formal notice prescribed by section 2, eighth, of the Railway Labor Act. The railway did not comply; the Act provided that failure to do so subjected the carrier to criminal penalty, whereupon the railway brought suit against the United States Attorney for the District of Utah, to restrain him from prosecuting any proceeding based on the alleged violation of the Act. The District Court took jurisdiction, permitted the railway to try the matter de novo, decided it was an interurban electric railway and granted a permanent injunction, which the Circuit Court of Appeals for the 10th circuit affirmed.[3] This Court granted certiorari and reversed the decision below, remanding the case with directions stating at page 185:

> "The sole remaining question would be whether the Commission in arriving at its determination, departed from the applicable rules of law and whether its find-

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national Brotherhood v. Kenan, 301 U. S. 687; Nashville, C. & St. L. Ry. v. Railway Employees' Dept. 93 F. (2d) 340 (C. C. A. 6) certiorari denied 303 U. S. 649; Brotherhood of Railway Clerk v. Nashville & St. L. Ry. Co., 94 F. (2d) 97 (C. C. A. 6); Brotherhood of Railway Clerks v. Virginian Ry. Co., 125 F. (2d) 863 (C. C. A. 4). National Federation of Railway Workers v. National Mediation Board, *supra*; cf. Virginian Ry. Co. v. System Federation No. 40; 300 U. S., at 562.

[3] 95 F. (2d) 911.

ing had a basis in substantial evidence or was *arbitrary* and *capricious*. This question must be determined upon the evidence produced before the Commission * * *." (Emphasis ours.)

and at page 187:

"It cannot be said upon this evidence and the related facts summarized in the Commission's report that the Commission's determination lacks support or was arbitrary and capricious. Nor is there ground for holding that the Commission in reaching its determination, departed from applicable principles of law * * *."

The case of *Virginian Railway* v. *System Federation #40*, 300 U. S. 515, deals mainly with the question of whether or not an injunction should be granted against the Virginian Railway Company preventing them from entering into any employment contract, except with the employees' true representative, and such review as the Court made of the Board's findings were for the purpose of determining whether or not the Board committed errors of law.

In any event it appears that the petitioners are asking for a review of the certification "at least to the extent of determining whether it is predicated upon an error of law."[4]

[4] Petitioner's brief, page 20.

III.

After the Board Found that the New York Central Railroad Company Was Operated as a Single Carrier, it Could Not as a Matter of Discretion Break Down the Class or Craft of Yardmen Within this Carrier (There Being No Dispute as to the Functional or Occupational Work of Yardmen) Into Geographical Segments or Units for the Purpose of Making Separate Bargaining Units.

The Mediation Board found on the facts after a full hearing at which considerable testimony was taken that the New York Central Railroad, including the lines which it operated as lessee, was operated as a single carrier within the meaning of the Railway Labor Act, and that the lessor lines had no employees, said lines having leased all of their equipment to the New York Central Railway on long term leases. The petitioners argued below that the finding of the Board on this point was not supported by substantial evidence but have apparently abandoned their contention as to this phase of the Board's findings.

The remaining question presented is whether under the Railway Labor Act in the event as to a dispute as to representation, the National Mediation Board can as a matter of discretion break down the craft or class of yardmen within a carrier into geographical segments or units for the purpose of making separate bargaining units of each segment, after the Board has found that the carrier consists of all these segments.

It is conceded that the Switchmen's Union and the Brotherhood of Railroad Trainmen (hereinafter referred to as B. R. T.) could not reach an agreement through the efforts of a mediator assigned by the Board as to the proper bargaining unit. It is the contention of the Switchmen, however, that this would not constitute a dispute among the carrier's employees. It should not require argument to make obvious the fact that employees act only through

their representatives. 4749 yardmen of the New York Central Railroad of approximately 6087 yardmen then employed by it signed authorization cards which were presented to the Board with the B. R. T. application (R. pp. 35-36, 137-138).

The petitioners states however (Br. p. 24):

> "There is no conclusive evidence in the record which discloses that any of the yardmen covered by the contracts of the Switchmen's Union questioned or disputed the right of such union to represent them".

This statement ignores the testimony of a B. R. T. representative who testified before the Board that there had been a dispute in January, 1940; that he received a petition addressed to him from 38 yardmen of the former Michigan Central at Toledo, out of a roster of 56 men, requesting representation by him because they were denied the right of having a local committee by the Switchmen's Union (R. 123-124). Also his testimony (R. 124) that:

> "700 employees in train, yard and engine service and among the car men at Detroit, had filed a petition to the C. I. O. for representation".

This statement also ignores the fact that the authorizations presented by the B. R. T. included 479 yardmen on the former Michigan Central Lines West of the Detroit River on which all the yardmen in the United States are represented by the Switchmen (the Michigan Central Lines East of the Detroit River being in Canada and not involved in this dispute) (R. 35). The records of the Mediation Board (R. 35) show 4749 authorizations were presented with the petition for invocation and further that 3653 yardmen were covered under the B. R. T. contract. It thus appears that a very large number of yardmen covered by contracts of the Switchmen's Union "questioned or disputed the right of such union to represent them."

While it is true that the B. R. T. in its invocation used the term New York Central *System*[5] this was amended by the B. R. T. to New York Central *Railroad*, which distinction is important, since there are a number of roads in which the New York Central has a substantial stock interest but does not operate and which roads are not involved in the present dispute and were not voted or considered by the Mediation Board.

In determining whether or not a dispute existed, it is first necessary to determine who the employees are. Since the The New York Central Lines East, New York Central Lines West, Toledo & Ohio Central, Michigan Central, Cleveland, Cincinnati, Chicago & St. Louis, and Boston and Albany have no operating employees and employ no yardmen, the boundary lines of these leased lines can have no particular significance. In the event of a dispute as to working conditions or rates of pay, etc., the representative of these employees, whether it be the Switchmen or the B. R. T., could not negotiate changes in rates of pay or contract conditions with these leased lines, because the employees are in fact, paid by the New York Central Railroad their employer, and since the Mediation Board has found that the New York Central Railroad and its leased lines is the carrier in this case, it seems apparent that the dispute existed among the employees of the New York Central Railroad. The argument of the petitioners, made on page 26 of their brief that

> "a group of employees satisfied with their own representation cannot reasonably be said to have a representation dispute within the meaning of the Act, with another group of employees who are satisfied with their representation"

ignores the findings of the Board as to who the carrier is and attempts to substitute in lieu thereof, allegedly satisfied *groups* within a carrier.

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[5] R. 28.

It is significant that the word "*group*" used by the petitioners was also used in the proposed amendment by Mr. Clements, Chairman of Committee on Railroads designated to deal with the proposed amendments to the Act, in unsuccessfully attempting to persuade the Senate Committee on Interstate Commerce to amend Section 2, Ninth, as follows, by adding the italicized words and omitting the words enclosed in brackets:[6]

> "If any dispute shall arise between a carrier's employees *or a group thereof* as to who are the representatives of such employees *or a group thereof* * * *, it shall be the duty of the Mediation Board * * * (etc.). * * * Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the (craft or class) *such employees or group thereof* for the purposes of this Act."

As pointed out in the petitioners' brief at page 28, the original enactment of this Act in 1926 did not contain any provision giving the majority the right to determine representation, which was remedied by the passage of extensive amendments, passed by Congress and approved June 21, 1934. Among these amendments were provisions for action by the Board to settle a dispute over representation, and Section 2, Ninth, expressly created the duty and authority of the Board in this respect, which provides:

> "*If any dispute shall arise among a carrier's employees* as to who are the representatives of such employees, designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. * * *" (*Emphasis ours*)

[6] Hearings before Senate Committee on Interstate Commerce, on S.3266, 73rd Congress, Second Session, 1934.

It will be seen this paragraph states that "if any dispute shall arise among the carrier's employees". The petitioner's contention is that this should be interpreted to mean "if any dispute shall arise among various groups of a carrier's employees" and proceeds to argue from this that even though these groups be members of the same craft or class (yardmen) still the dispute can only exist as to these groups and only these groups can be polled in the event of a representation election. This was not the intention of either those who favored or opposed the 1934 amendments and an additional amendment proposed to meet the situation in the instant case, was not enacted. It is apparent the deliberate refusal to adopt this amendment was in line with the policy adopted by Mr. Eastman, then Federal Coordinator of Transportation, to make it unnecessary for the carrier to deal with more than one representative of a given craft or class.

It has been the practice of the Board to require that signed authorizations be presented with an invocation for its services in a representation dispute and unless the authorizations constitute a majority of the craft or class of the carrier, the Mediation Board will refuse its services. This practice of the Board would seem to take care of the situation suggested by Justice Rutledge in his dissenting opinion:[7]

> "* * * It makes the Act an invitation and an instrument for creating labor strife, especially in stirring up jurisdictional disputes. It gives this weapon to, and throws the whole weight of the legislation in favor of, the big unions as against the smaller ones. All that is needed for ouster of the latter is to cause some employee to question or 'dispute' their right to act as representative, which a large union can always do. * * *"

Since the Board requires a majority of authorizations to be presented before it will investigate the dispute or hold

[7] R. 182.

an election, it would seem that a majority of the carrier's employees would have to be involved in the dispute.

The argument of petitioners that the words which are "implied" but omitted in Section 2, Fourth, are the following italicized words:

> "The majority of any craft or class of employees *who are involved in a dispute* shall have the right to determine who shall be the representative of the craft or class for the purpose of this Act."

does not help the petitioner's position without adding another "implication", namely:

> "The majority of any class or craft of employees *less than carrier wide* * * *"

The petitioner's argument does, however, serve to illustrate the ease by which this section could have been amended to substantiate petitioner's contention but as stated, amendments to cover this situation were not enacted.

Evidence produced before the Board shows that in most cases the present lessors to the New York Central Railroad were themselves lessees of smaller roads.[8] Had these smaller roads held agreements which encompassed the boundary lines of the original lessor corporations and were these agreements in effect at the time of the 1934 amendments, the classes or crafts would have been frozen into this contractual mold from which they could never vary, should the position of the petitioners be adopted on this point and which position, as Justice Rutledge pointed out in his dissenting position, was too rigid. As stated in petitioner's brief, page 39, the Switchmen's contract covers yards rather than craft. By reference to the findings of the Mediation Board (R. 35), it will be seen that there are large numbers of yards on various segments of the New

[8] R. 33-34.

York Central Railroad. In the event of a representation dispute on these various yards, were the yards polled individually, it is conceivable the railroad would be forced to deal with a different employee representative for each yard, which was the exact thing Mr. Eastman wished to avoid.

The petitioners state at page 33 of the brief:

> "The great railroad systems such as the New York Central, Pennsylvania, and the Southern Pacific (to mention only a few) are the products of consolidation of many small railroads. They operate over such vast stretches of territory, involving so many different operating and climatic conditions, that separate operating divisions are inevitable and necessary to efficiency. Some of these are essentially the maintenance of earlier separate companies. Some of them are the results of a later division of managerial powers. But the record of the proceeding before the Board is replete with evidence of the fact that employees may belong to the same craft, but work on different sections of a railroad system, hundreds of miles apart, subject to localized management, dealing with local conditions, working under contracts that, because of local conditions or historical development, vary in their terms and application and that such employees when they work, for example, on the Boston & Albany operating from Albany east, will not be in any real way *involved* in a dispute which may arise on the Michigan Central Railroad or New York Central-Lines West."

The fact is that the Pennsylvania Railroad has *one* contract covering all yardmen and trainmen which had its inception in 1920 (R. 101), and another contract covering all yardmen on the entire Pennsylvania Railroad was entered into with the B. R. T. on September 16, 1942, copy of which is on file with the Mediation Board. It is significant that the contract previous to the present one was in effect for 15 years. Indeed, the New York Central itself recognized the wisdom of having one contract on the entire system by entering into a contract with the B. R. T. affecting all din-

ing car stewards on the New York Central System and are endeavoring to negotiate a uniform contract covering cooks and waiters (R. 149). Mr. Walber (R. 150) referring to train dispatchers and railroad telegraphers, states:

> "When it becomes necessary to negotiate changes in the New York Central agreement, special arrangements are usually made for joint handling for the New York Central and Big Four."

It should not require any argument to indicate the desirability of having one contract with one representative affecting a particular craft, rather than many contracts with many organizations covering each yard or so-called local condition. The very purpose and basis of the Railway Labor Act as indicated not only by Sec. 2, Fifth, but by the hearings which took place before the various committees on the 1934 amendment, all of which are quoted in detail in the brief of the Mediation Board, show conclusively that the simplification and avoidance of friction between the employers and employees was one of the underlying purposes of the passage of the 1934 amendments to the Railway Labor Act.

The "local conditions" mentioned by the petitioner (Br. p. 39) are not pointed out by it. The principal things affecting yardmen are rates of pay, hours of service, seniority rosters, overtime provisions, the handling of grievances, duties involved and promotions; these conditions are of paramount concern to yardmen whether employed on the New York Central Lines West or the Michigan Central, West of the Detroit River. The record of hearings before the Mediation Board will indicate that very rarely do conditions arise in one yard wholly foreign to conditions in another, but the converse is true, that so-called "local condition" are the basis used for contracts governing all yardmen, as indicated by the evidence of one contract on the Pennsylvania Railroad affecting all yard conductors, road and yard brakemen, baggagemen, assistant ticket collectors, etc. (R. 101).

It is agreed that the Act was designed to promote industrial peace, which, as recognized by Mr. Eastman, would be promoted by having one representative for one craft for one carrier.

The question as to whether or not the bargaining unit was to be carrier wide was one for the determination of Congress. There can be no doubt that Congress knew that the provisions of the Railway Labor Act required the bargaining unit to be carrier-wide, because it was recognized at all committee hearings that an amendment was necessary to make it less than carrier wide and Commissioner Eastman gave definite reasons why he wanted it to be carrier wide. Since Congress, while recognizing the need for amendments to make the unit less than carrier wide, passed the 1934 Sections *without* these amendments, it would seem conclusive that Congress intended no discretion be given to the Mediation Board in the determination of the bargaining unit.

This Court said in *Shields* v. *Utah Idaho Central Railroad Company*, 305 U. S. 177, in considering the Interstate Commerce Commission's determination as to whether or not the Utah Idaho Central Railroad was an interurban line, and as such, exempt from the provisions of the Railway Labor Act, that:

> "In considering the effect of the Commission's determination, the fundamental question is the intent of Congress".

Had Congress intended to give this discretion to the Board, it could have very easily done so by the adoption of any one of a number of amendments proposed either by Mr. Walker, Vice-President of the New York Central Railroad[9] or Mr. Clements, Chairman, Committee for Railroads to deal with 1934 amendments to Railway Labor Act,[10] who testified at the committee hearings as to the effect of the 1934 amend-

[9] R. 179.

[10] R. 179-180.

ments, or by supplying the words which the petitioners contend were *implied*.

A comparison of the National Labor Relations Act, where the authority was specifically delegated to the National Labor Relations Board to select appropriate units, with the Railway Labor Act is enlightening.

Title 29, Section 159, U. S. C., paragraph (a) provides:

> "Representatives designated or selected for purposes of collective bargaining by a majority of the employees *in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit* for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment * * *"

Paragraph (b) provides:

> "The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of sections 151-166 of this title, *the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.*

In the Railway Labor Act itself we find that Congress specifically gave to the Mediation Board the right to require of the Interstate Commerce Commission, the determination of whether or not a railroad was an interurban line,[11] even though Congress omitted any definition of an interurban line and it seems a far-fetched argument to state that while it gave definite duties involving discretion to the Mediation Board and the Interstate Commerce Commission in the illustration just given, it intended, but failed to do so, in the case of fixing less than the carrier wide unit, even though everyone at the committee hearings recognized amendments were necessary to give this discretion.

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[11] Section 1, First, Railway Labor Act.

In the case of *Virginian Railway Company* v. *System Federation No. 40*, 300 U. S. 515, this Court said at page 553:

> "The Railway Labor Act, paragraph 2, (45 U. S. C. A. paragraph 151-a), declares that its purposes, among others are to avoid any interruption to interstate commerce or to the operation of any carrier engaged therein * * * It was for Congress to make it possible and the means by which its objective of securing uninterrupted service of interstate railroads was to be secured and its judgment supported as it is by long experience with industrial disputes, the history of railroad labor relations, to which we have referred, is not open to review here".

In view of the purposes of the Railway Labor Act, is it not reasonable to suppose that these purposes would best be served by having a railroad deal with one representative representing one craft, rather than force it to have many agreements with many separate organizations representing the same craft, which, should the petitioner's contention be adopted, could be a separate organization for each yard. Indeed, Commissioner Eastman's very words were[12]:

> "* * * When it comes to collective bargaining in the matter of wages and working conditions, it seems to me plain that a company ought not be compelled to deal with more than one organization. It ought not to have to make bargains with two or three different organizations. * * *

IV.

Section 2, Third and Fourth Intended to Prevent Carrier Interference, Not Applicable Here.

Petitioners state (Br. p. 35) that the Act as presented to Congress was a joint product of Railway Management and Railway Labor. While this is true as to the original Act

[12] Hearings before House Committee on Interstate and Foreign Commerce on H. R. 7650, Railway Labor Act, Amendments, 73d Cong., 2nd Sess. Page 44.

passed in 1926, it appears that Mr. Eastman, who was then Federal Coordinator of Transportation, urged the adoption of the 1934 amendments, embodying Section 2, Ninth for the purpose of facilitating dealings between railroads and employees.

The purposes as set out in Section 2 of the Act as amended plainly relates to carrier coercion.

Section Third deals with coercion by either party.

Section Fourth

> Employees *shall have the right* to organize and bargain collectively through representatives of their own choosing. The *majority* of any craft or class of employees shall have the right to determine who shall be the *representative* of the craft or class for the purposes of this Act * * *

is pertinent because of the portion emphasized. (Italics ours.)

If the interpretation that the petitioner places upon section 1 Fifth were adopted, it would render meaningless Section 2, Ninth, passed in 1934. It appears, however, that the only purpose of this section was to preclude the minute classification[13] made by the Interstate Commerce Commission from in any way being binding upon employees.

The petitioner points out that the importance of this provision was overlooked in the consideration of this matter by the Board. Perhaps a better explanation would be that the Board, as well as the courts below, did not consider it applicable.

The explanation of Mr. Richberg in his testimony before the House Committee on Interstate and Foreign Commerce regarding the bill as proposed in 1926[14], is enlightening:

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[13] Rules for Reporting Information on Railroad Employees, together with a Classification and Index of Steam Railroad Occupations, issued by the United States Railway Labor Board and approved by the Interstate Commerce Commission (1921).

[14] House Committee Hearings on H. R. 7180, January 26, 27, 1926, p. 64. Petitioner's Brief, Note 14, page 38.

> "There is absolutely nothing in this Act which gives any special privilege or aid to any organization, except this and that is that if an organization is of the type that the employees themselves want, it will strengthen that organization because they have a right to be represented as they see fit. If it is of the type that they do not want, it will weaken that organization. In other words it must stand on its own merits."

Mr. Richberg realized the Act intended majority representation. It is apparent that the B. R. T. is the type of organization that the employees themselves want and according to Mr. Richberg's explanation, they have a right to be represented as they see fit. No where in this explanation can it be found that "they" means employees on a particular segment of a railroad and in view of the explanation given, not only by Mr. Richberg, but others at the various committee hearings and the refusal of Congress to embody any provisions in the 1934 amendments to the Railway Labor Act limiting the unit to any particular portion of a carrier, it is obvious this was not intended.

The interpretation of "far reaching consequences" placed upon Mr. Walber's testimony by the petitioner (Br. p. 39) (he having testified of many instances of more than one organization representing the same class of employees on different parts of the *system*) overlooks the fact that we are not now dealing with the New York Central *System* but the New York Central *Railroad* and does not take into consideration the fact that Mr. Walber himself realizes the value of having one contract with one craft whenever possible. (Supra p. 17.)

In making the argument that the effect of the ruling of the Board is to destroy valuable rights of self organization of the employees because organizations will be compelled to create or maintain an organization covering an entire railroad system so that they can at all times obtain a majority vote of all employees of one craft in support of their representation, the petitioners overlook the fact that rail-

way labor organizations are intended to be primarily for the benefit of their members and these members would be benefitted by being represented by an organization negotiating for all the members of one craft or class. The majority would be taking the minority into their fold and any contract negotiated for the benefit of the stronger would, naturally, include the weaker, who had then become members of the stronger. The railroad would not have the advantage of playing one organization against the other, as so often happens in dealings with rival organizations representing the same craft or class, but the railroad would, in turn, have the advantage of being able to negotiate with one rather than many organizations for the same craft or class.

It is stated by the petitioners (Br. p. 47):

> "Petitioners contend that employees should be permitted to establish the bargaining unit in the exercise of their right of self-organization. Thus, whenever a group of employees covered by a contract desire to change their bargaining unit and combine with some larger unit, they may do so if a majority of the employees involved desire to make the change."

The majority of the yardmen of the New York Central Railroad desire Brotherhood representation and unless there is some magic in the word "involved", heretofore unexplained, the petitioners are attempting to prevent the employees of the carrier from doing the very thing they wish to do.

If the petitioners had agreements in effect at the time of the passage of the Railway Labor Act or amendments, they certainly would not, by virtue of these agreements, obtain any vested right which would enable them to have the boundary lines encompassing the yardmen involved in the agreement, indelibly fixed. By way of illustration, suppose one of the lessor corporations had then sold a part of its line, lock, stock and barrel, to another railroad company. Could it be claimed that, notwithstanding the fact that the

original lessor corporation is now owned by two separate companies, the group as covered by the original contract could not be changed; and if it could not be claimed, should this principal apply when all the equipment is leased and the lessor company ceases to have any operating employees? The majority opinion of the Court of Appeals treats the petitioners' contention in this regard as follows:[15]

> "Appellants admit that, were there no separate existing contracts as here, the action of the Board in unifying the Railroad Company might be proper; but that, as it is, the Board is confined to the dispute of the particular division under the existing contract. We believe appellants come close to admitting themselves into a losing position. The Act plainly provides that the *majority* of any craft or class shall determine *the representative* (not representatives) of the craft or class for the purposes of the Act. Appellants cannot complain of interference with their contracts if the provision is a lawful exercise of Congressional authority. Their contracts were necessarily made subject to that authority. It is an established principle that appellants must be considered to have made their contracts in contemplation of the contingency that they might be invalidated by a proper exercise of legislative power."

CASES CITED BY PETITIONER.

The conflict claimed by the petitioners in the case of *B. R. T.* v. *National Mediation Board*, (88 F. (2d) 757) does not support their position, since this case dealt with the question as to whether brakemen who spent the larger portion of their time as road conductors were eligible to vote as such, for representation. The court's referring to established custom, plainly relates to occupational and not territorial scope. The case was reversed because no hearing was granted by the Board and, therefore, its action was termed arbitrary and capricious.

[15] R. 171.

The case of *Brotherhood of Railway and Steamship Clerks, etc.* v. *N. C. & St. L. Railway* (94 Fed. 2nd 97), decided in 1937 by the United States Court of Appeals for the 6th Circuit, had to do with the question of whether or not employees who performed laboring work were to be included under the craft of clerks. It will thus be seen that this had to do with functional rather than geographical scope.

The third case cited is that of the *O. R. C.* v. *National Mediation Board* (113 Fed. 2nd 531). This case dealt with the question of whether or not the Board was arbitrary and capricious in determining that yard conductors, yard brakemen or helpers and switch tenders constituted the craft or yardmen and the court held it was not so, in view of the fact that yardmen had considered this group embraced in the term. The Board had, previous to its final determination, before a hearing, certified the O. R. C. as representing part of this group but, after a hearing, determined their previous decision was wrong. The court said at page 534:

> "New employees began as brakemen or trainmen interchangeably on the road and in the yard. After a year they may take examinations for promotion to yard foreman and road flagman. * * *"

When these employees are on the road, they might travel over a large portion of the railroad, which appears to be another valid reason for having carrier wide crafts.

All these cases were cited by the petitioner in the brief in the Court of Appeals and the majority decision of the Court of Appeals [16] disposed of the claims made for them as follows:

> "Appellants have cited cases which hold that Congress intended employees to be given the right to retain the crafts or classes as they were formerly recognized or established by mutual agreement between employee and carrier. It is sufficient, however,

[16] R. 173.

to say that these cases were concerned with disputes as to the craft or class to which the nature of an employee's work entitled him to belong, and not with the area which was to be considered the compass of that craft or class".

CONCLUSION.

It is submitted that the judgments of the lower Courts should be affirmed.

Respectfully submitted,

BERNARD M. SAVAGE,
ALFRED L. BENNETT,
Attorneys for Respondent Brotherhood of Railroad Trainmen.

APPENDIX.

The pertinent provisions of the Railway Labor Act of 1926, 45 Stat. 577, as amended in 1934, 48 Stat. 1185, 45 U. S. C., Secs. 151, *et seq.*, read as follows:

SECTION 1. When used in this Act and for the purposes of this Act—

First. The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": *Provided*, however, That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso.

* * * * * * * * *

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby

conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission.

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

* * * * * * * * * *

SEC. 2. * * *

GENERAL PURPOSES.

(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

* * * * * * * * * *

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. * * *

* * * * * * * * * *

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such

employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election, and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

* * * * * * * * *

dis. p. 11.

SUPREME COURT OF THE UNITED STATES.

No. 48.—October Term, 1943.

Switchmen's Union of North America, in its Own Right, etc., T. C. Cashen, et al., Petitioners,
vs.
National Mediation Board, George A. Cook, William M. Leiserson, et al.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[November 22, 1943.]

Mr. Justice Douglas delivered the opinion of the Court.

This is an action by the petitioners, the Switchmen's Union of North America and some of its members against the National Mediation Board, its members, the Brotherhood of Railroad Trainmen, and the New York Central Railroad Company and the Michigan Central Railroad Company. The individual plaintiffs are members and officials of the Switchmen's Union and employees of the respondent carriers.

Petitioners were plaintiffs in the District Court. A certification of representatives for collective bargaining under § 2, Ninth of the Railway Labor Act (44 Stat. 577, 48 Stat. 1185) was made by the Board to the carriers.[1] This certification followed the invocation of the services of the Board to investigate a dispute among the yardmen as to their representative. The Brotherhood sought to be the representative for all the yardmen of the rail lines operated by the New York Central system. The Switchmen contended that yardmen of certain designated parts

[1] Sec. 2, Ninth provides: "If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirments of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to

of the system should be permitted to vote for separate representatives instead of being compelled to take part in a system-wide election.

The Board designated all yardmen of the carriers as participants in the election. The election was held and the Brotherhood was chosen as the representative. Upon the certification of the result to the carriers, petitioners sought to have the determination by the Board of the participants and the certification of the representative cancelled. This suit for cancellation was brought in the District Court. That court upheld the decision of the Board to the effect that all yardmen in the service of a carrier should select a single representative for collective bargaining. The Circuit Court of Appeals affirmed by a divided vote. 135 F. 2d 785. The case is here on a petition for a writ of certiorari which we granted because of the importance of the problems which are raised.

We do not reach the merits of the controversy. For we are of the opinion that the District Court did not have the power to review the action of the National Mediation Board in issuing the certificate.

Sec. 24(8) of the Judicial Code, 28 U. S. C. § 41(8), gives the federal district courts "original jurisdiction" of all "suits and proceedings arising under any law regulating commerce." We may assume that if any judicial review of the certificate of the Board could be had, the District Court would have jurisdiction by reason of that provision of the Judicial Code. See *Louisville & Nashville R. Co.* v. *Rice*, 247 U. S. 201; *Mulford* v. *Smith*, 307 U. S. 38; *Peyton* v. *Railway Express Agency*, 316 U. S. 350. But we do not think that that broad grant of general jurisdiction may be invoked in face of the special circumstances which obtain here.

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utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control. That was the purport of the decisions of this Court in *Texas & N. O. R. Co.* v. *Brotherhood of Ry. and S.S. Clerks*, 281 U. S. 548, and *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515. In those cases it was apparent that but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress had written into the Railway Labor Act. The result would have been that the "right" of collective bargaining was unsupported by any legal sanction. That would have robbed the Act of its vitality and thwarted its purpose. Such considerations are not applicable here. The Act in §2, Fourth writes into law the "right" of the "majority of any craft or class of employees" to "determine who shall be the representative of the craft or class for the purposes of this Act." That "right" is protected by § 2, Ninth which gives the Mediation Board the power to resolve controversies concerning it and as an incident thereto to determine what is the appropriate craft or class in which the election should be held. See *Brotherhood of Railroad Trainmen* v. *National Mediation Board*, 88 F. 2d 757; *Brotherhood of Railroad Trainmen* v. *National Mediation Board*, 135 F. 2d 780. A review by the federal district courts of the Board's determination is not necessary to preserve or protect that "right". Congress for reasons of its own decided upon the method for the protection of the "right" which it created. It selected the precise machinery and fashioned the tool which it deemed suited to that end. Whether the imposition of judicial review on top of the Mediation Board's administrative determination would strengthen that protection is a considerable question.[2] All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced. *Tutun* v. *United States*, 270 U. S. 568, 576-577. In such a case the specification of one remedy normally excludes another. See *Arnson* v. *Murphy*, 109 U. S. 238; *Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U. S. 165, 174-175; *United*

[2] "Even courts have been known to make rulings thought by counsel to be erroneous." *Crane* v. *Hahlo*, 258 U. S. 142, 148.

States v. *Babcock*, 250 U. S. 328, 331; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 404.

Generalizations as to when judicial review of administrative action may or may not be obtained are of course hazardous. Where Congress has not expressly authorized judicial review, the type of problem involved and the history of the statute in question become highly relevant in determining whether judicial review may be nonetheless supplied. See *United States* v. *Griffin*, 303 U. S. 226, 232-237. As is indicated at some length in *General Committee of Adjustment* v. *Missouri-Kansas-Texas R. Co.*, No. 23, decided this day, the emergence of railway labor problems from the field of conciliation and mediation into that of legally enforcible rights has been quite recent. Until the 1926 Act the legal sanctions of the various acts had been few. The emphasis of the legislation had been on conciliation and mediation; the sanctions were publicity and public opinion. Since 1926 there has been an increasing number of legally enforcible commands incorporated into the Act. And Congress has utilized administrative machinery more freely in the settlement of disputes. But large areas of the field still remain, in the realm of conciliation, mediation, and arbitration. On only a few phases of this controversial subject has Congress utilized administrative or judicial machinery and invoked the compulsions of the law. We need not recapitulate that history here. Nor need we reiterate what we have said in the *Missouri-Kansas-Texas R. Co.* case beyond our conclusion that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate.

In that connection the history of § 2, Ninth is highly relevant. It was introduced into the Act in 1934 as a device to strengthen and make more effective the processes of collective bargaining. *Virginian Ry. Co.* v. *System Federation No. 40*, *supra*, pp. 543-549. It was aimed not only at company unions which had long plagued labor relations (*id.*, pp. 545-547) but also at numerous jurisdictional disputes between unions. Commissioner Eastman, draftsman of the 1934 amendments, explained the bill at the Congressional hearings. He stated that whether one organization or another was the proper representative of a particular group of employees was "one of the most controversial questions in connection with labor organization matters." Hearings, Committee on Interstate & Foreign Commerce, House of Representatives, on

H. R. 7650, 73d Cong., 2d Sess., p. 40. He stated that it was very important "to provide a neutral tribunal which can make the decision and get the matter settled." *Id.*, p. 41. But the problem was deemed to be so "highly controversial" that it was thought that the prestige of the Mediation Board might be adversely affected by the rulings which it would have to make in these jurisdictional disputes. *Id.*, p. 40. And see Hearings, Committee on Interstate Commerce, U. S. Senate, on S. 3266, 73d Cong., 2d Sess., pp. 134-135. Accordingly § 2, Ninth was drafted so as to give to the Mediation Board the power to "appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election." That was added so that the Board's "own usefulness of settling disputes that might arise thereafter might not be impaired." S. Rep. No. 1065, 73d Cong., 2d Sess., p. 3. Where Congress took such great pains to protect the Mediation Board in its handling of an explosive problem, we cannot help but believe that if Congress had desired to implicate the federal judiciary and to place on the federal courts the burden of having the final say on any aspect of the problem, it would have made its desire plain.

The fact that the certificate of the Mediation Board is conclusive is of course no ground for judicial review. *Great Northern Ry. Co.* v. *United States*, 277 U. S. 172, 182. Congress has long delegated to executive officers or executive agencies the determination of complicated questions of fact and of law. And where no judicial review was provided by Congress this Court has often refused to furnish one even where questions of law might be involved. See *Louisiana* v. *McAdoo*, 234 U. S. 627, 633; *United States* v. *George S. Bush & Co.*, 310 U. S. 371; *Work* v. *Rives*, 267 U. S. 175; *United States* v. *Babcock*, *supra*. We need not determine the full reach of that rule. See *Bates & Guild Co.* v. *Payne*, 194 U. S. 106; *Houston* v. *St. Louis Independent Packing Co.*, 249 U. S. 479. But its application here is most appropriate by reason of the pattern of this Act.

While the Mediation Board is given specified powers in the conduct of elections, there is no requirement as to hearings. And there is no express grant of subpoena power. The Mediation Board makes no "order". And its only ultimate finding of fact is the certificate. *Virginian Ry. Co.* v. *System Federation No. 40*,

supra, p. 562. The function of the Board under § 2, Ninth is more the function of a referee. To this decision of the referee Congress has added a command enforcible by judicial decree. But the "command" is that "of the statute, not of the Board." *Id.*, p. 562.

The statutory mandate is that "the carrier shall treat with the representative so certified." § 2, Ninth. But the scheme of § 2, Ninth is analagous to that which existed in *Butte, A. & P. Ry. Co.* v. *United States*, 290 U. S. 127. In that case Congress provided compensation to the owners of short-line railroads for losses attributable to federal control of the main systems during the first World War. The Interstate Commerce Commission was directed by § 204 of the Transportation Act of 1920 to ascertain the amount of deficits or losses and to "certify to the Secretary of the Treasury the several amounts payable" to the carriers. And the Secretary of the Treasury was "authorized and directed thereupon to draw warrants in favor of each such carrier upon the Treasury of the United States for the amount shown in such certificate as payable thereto." Payments were made to the Butte company on such a certificate and the United States instituted suit to recover on the theory that the money had been disbursed on an erroneous interpretation of the statute. This Court, speaking through Mr. Justice Brandeis, held that since authority to interpret the statute was "essential to the performance of the duty imposed upon the Commission" and since "Congress did not provide a method of review", the Government, as well as the carrier, was "remediless whether the error be one of fact or of law." *Id.*, pp. 142-143. Cf. *United States* v. *Great Northern Ry. Co.*, 287 U. S. 144.

In the present case the authority of the Mediation Board in election disputes to interpret the meaning of "craft" as used in the statute is no less clear and no less essential to the performance of its duty. The statutory command that the decision of the Board shall be obeyed is no less explicit. Under this Act Congress did not give the Board discretion to take or withhold action, to grant or deny relief. It gave it no enforcement functions. It was to find the fact and then cease. Congress prescribed the command. Like the command in the *Butte Ry.* case it contained no exception. Here as in that case the intent seems plain—the dispute was to reach its last terminal point when the

administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law.

That conclusion is reinforced by the highly selective manner in which Congress has provided for judicial review of administrative orders or determinations under the Act. There is no general provision for such review. But Congress has expressly provided for it in two instances. Thus Congress gave the National Railroad Adjustment Board jurisdiction over disputes growing out of "grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." § 3, First (i). The various divisions of the Adjustment Board have authority to make awards. § 3, First (k)-(o). And suits based on those awards may be brought in the federal district courts. § 3, First (p). In such suits "the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated." The other instance in the Act where Congress provided for judicial review is under § 9. The Act prescribes machinery for the voluntary arbitration of labor controversies. § 5, Third; § 7; § 8. It is provided in § 9 that an award of a board of arbitration may be impeached by an action instituted in a federal district court on the grounds specified in § 9, one of which is that "the award plainly does not conform to the substantive requirements laid down by this Act for such awards, or that the proceedings were not substantially in conformity with this Act." § 9, Third (a). When Congress in § 3 and in § 9 provided for judicial review of two types of orders or awards and in § 2 of the same Act omitted any such provision as respects a third type, it drew a plain line of distinction. And the inference is strong from the history of the Act that that distinction was not inadvertent. The language of the Act read in light of that history supports the view that Congress gave administrative action under § 2, Ninth a finality which it denied administrative action under the other sections of the Act.

Shields v. *Utah Idaho R. Co.*, 305 U. S. 177, is not opposed to that view. That case involved a determination by the Interstate Commerce Commission under § 1, First of the Act that the lines of the carrier in question did not constitute an interurban electric railway. The result was that the railroad company was a "carrier" within the meaning of the Act and subject to its criminal penalties. The carrier brought a suit in equity against a United

States Attorney to restrain criminal prosecutions under the Act. This Court allowed the action to be maintained even though the Railway Labor Act contained no provision for judicial review of such rulings. But the decision was placed on the traditional use of equity proceedings to enjoin criminal proceedings. 305 U. S. p. 183. Moreover, it was the action of the Interstate Commerce Commission which this Court held to be reviewable. Although the authority of the Commission derived from the Railway Labor Act, this Court quite properly related the issue not to railway labor disputes but to those transportation problems with which the Commission had long been engaged. And see *Shannahan* v. *United States*, 303 U. S. 596. The latter have quite a different tradition in federal law than those pertaining to carrier-employee relationships.

What is open when a court of equity is asked for its affirmative help by granting a decree for the enforcement of a certificate of the Mediation Board under § 2, Ninth raises questions not now before us. See *Virginian Ry. Co.* v. *System Federation No. 40*, *supra*, pp. 559-562.

Reversed.

Mr. Justice BLACK and Mr. Justice RUTLEDGE took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES.

No. 48.—October Term, 1943.

Switchmen's Union of North America, in its own right, etc., T. C. Cashen, et al., Petitioners,
vs.
National Mediation Board, George A. Cook, William M. Leiserson, et al.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[November 22, 1943.]

Mr. Justice Reed, dissenting.

This is an action by the petitioners, the Switchmen's Union of North America (hereinafter referred to as the Switchmen) and some of its members against the National Mediation Board, its members, the Brotherhood of Railroad Trainmen (hereafter referred to as the Brotherhood) and the New York Central Railroad Company and the Michigan Central Railroad Company, carrier employers of the members of the before-mentioned unions. The individual petitioners are members and officials of the Switchmen's Union and employees of one or the other of the carriers.

Petitioners were plaintiffs in the United States District Court for the District of Columbia. A certification of representatives for collective bargaining under Sec. 2, Ninth, of the Railway Labor Act[1] was made by the Board to the carriers. This certification followed the invocation of the services of the Board to investigate a dispute among the yardmen of the carriers as to their representative. The Brotherhood sought to be the representative for all the yardmen of rail lines, including the Michigan Central, operated by the New York Central Railroad Company and obtained the designation of participants in the election for representative of the employees upon this wide basis. The Switchmen contended that yardmen of certain designated parts of the carrier property should be permitted to choose separately their

[1] 44 Stat. 577, as amended 48 Stat. 1185.

own representatives instead of being compelled to take part in a carrier-wide election.[2]

The Board of Mediation is the ageney created by statute to designate employees who may participate in the selection of representatives under the act.[3] The Board undertook to perform this function and made its findings and conclusions after presentation of the issues by the Brotherhood, the Switchmen and other intervenors. The Board concluded that the

"Railway Labor Act vests the Board with no discretion to split a single carrier or combine two or more carriers for the purpose of determining who shall be eligible to vote for a representative of a craft or class of employees under Section 2, Ninth, of the Act, and the argument that it has such power fails to furnish any basis of law for such administrative discretion."

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[2] Finding 7 of the District Court shows the distribution of yardmen of the New York Central Lines based upon union affiliation, as follows:

"7. There are approximately 6,087 yardmen employed by the Railroad Company. At the time the Board's services were invoked the plaintiff Switchmen's Union represented the yardmen in all but nine yards on the New York Central—Lines West of Buffalo and in all yards on the Michigan Central west of the Detroit River, including the South Bend Transfer Crews. The defendant Brotherhood represented yardmen in yards on the Michigan Central east of the Detroit River, in nine yards on the New York Central—Lines West of Buffalo, and all yardmen on the New York Central—Lines East of Buffalo, the Toledo and Ohio Central, The Big Four, and the Boston and Albany; and at that time no one questioned the right of the Brotherhood to represent the yardmen employed on the four last mentioned lines."

[3] 48 Stat. 1185, 1188-9, sec. 2:

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

Consequently the Board found that the "New York Central Railroad Company and all of its operated subsidiaries . . . is a single carrier" and

"all of the employees of any given craft or class, such as yardmen, in the service of a carrier so determined must therefore be taken together as constituting the proper basis for determining their representation in conformity with Section 2, Ninth, of the Railway Labor Act.

"The mediator assigned to the investigation of this dispute will therefore proceed accordingly with the completion of his duties in connection with the Board's investigation of this dispute. That is to say, he shall regard as the proper basis for the representation of the yardmen in the service of the entire New York Central Railroad Company all of the yardmen in such service."

The election based upon this determination and certification followed in due course.

After the Board's designation of all yardmen of the carrier lines as participants in the election, the election was held and the Brotherhood chosen as the representative. As stated in the court's opinion, upon the certification of the result to the carriers, petitioners sought to have the determination by the Board of the participants and the certification of the representatives cancelled. But in addition an injunction against the Botherhood and the carriers was asked to restrain them from negotiating agreements concerning the craft of yardmen on the carriers' lines. This suit was brought in the District Court. It was there dismissed on the ground that the conclusion of the Board that all yardmen in the service of a single carrier may be taken together as constituting a proper basis for selecting a representative for collective bargaining "is reasonable, proper and not an abuse of discretion" and therefore should not be set aside. This decree was affirmed by the United States Court of Appeals for the District of Columbia but upon the ground of lack of power in the Board to act otherwise if the lines involved were a single carrier. The unity of the carrier is accepted.[4]

[4] Switchmen's Union of N. America v. National M. Board, 135 F. 2d 785, 796.

"The argument was made to the Congressional Committees that the precise language now under consideration would bring possible repercussion in railway labor relations. Specific amendments were proposed which would have allowed the division of a craft or class. Congress was not persuaded that the unification process was not in the best interest of employees and carriers.

As treated by the Board and the courts below the problem presented by this case is one of statutory interpretation, whether or not Section 2, Ninth, gives discretion to the Board to split the crafts of a single carrier into smaller units so that the members of such units may choose representatives of employees. This Court bases its conclusion upon the lack of power in any court to pass upon such an issue and leaves the interpretation of the authority granted by Section 2, Ninth, finally to the Board. With this denial of judicial power, I cannot agree.

The constitutional validity of the principle of collective bargaining concerning "grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions"[5] of employees of interstate carriers is accepted.[6] It follows that the Congress, as an incident to such legislation, has the power to designate the representative of the employees or group or craft of employees for the purpose of bargaining. Instead of making such selection itself Congress has delegated to the employees the choice of the representatives[7] and the determination of these representatives, in case of any dispute as to their identity,

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It is for Congress to determine policy. Our province is to keep the Board within the confines of that policy. We are of the opinion that the Board correctly determined it had no discretion to deny the request of a majority of the yardmen employed by the Railroad Company to appoint a representative for their craft."

[5] 48 Stat. 1185, 1186-7, sec. 2:

"(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

[6] Virginian Ry. v. Federation, 300 U. S. 515, 553; Texas & N. O. R. Co. v. Ry. Clerks, 281 U. S. 548, 570.

[7] 48 Stat. 1185, 1187, sec. 2:

"Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier

to the National Mediation Board. As these delegations are surrounded by adequate standards no question is raised as to the validity of the statutory provisions for the selection or determination of the representatives. Cf. *Opp Cotton Mills* v. *Admr. of Wage and Hour Div.*, 312 U. S. 126, 142-146.

Where duties are delegated, as here, to administrative officers, those administrative officers are authorized to act only in accordance with the statutory standards enacted for their guidance. Otherwise we should risk administrative action beyond or contrary to the legislative will. Cf. *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 489. The Railway Labor Act does not provide specifically for judicial review of the certification by the Mediation Board under Sec. 2, Ninth, of representatives, even though that certification is based upon an erroneous interpretation of the statute. Nor is there any clause in the act granting to interested parties, generally, a right to have actions of the Board reviewed. Where an act fails to provide for review of preliminary rulings determining status in preparation for subsequent action,[8] or performing administrative duties which were not final in character,[9] such rulings have not been considered as subject to review by virtue of general statutory review provisions. The reason that review is not allowed at such a stage is that the rulings or orders are only preparation for future effective action. The *Rochester Telephone Corporation* case, 307 U. S. at 143-4, teaches that where this otherwise abstract determination of status has instantaneous, final effect, such determination comes under general statutory review provisions. In the present instance the certification of Sec. 2, Ninth, is but a preparatory

in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization."

[8] Rochester Tel. Corp. v. United States, 307 U. S. 125, 130; Shannahan v. United States, 303 U. S. 596, 599.

[9] United States v. Griffin, 303 U. S. 226, 234; United States v. Los Angeles & S. L. R. Co., 273 U. S. 299, 309-310.

step to bring about the collective bargaining which is the essential purpose of the Act but it does have an immediate effect since it destroys the petitioners' alleged right to participate in an election based on their view of the proper electoral unit. Yet there is no direct review of the certification, general or special, by the terms of the Railway Labor Act.

Nor is there necessarily an opportunity to attack the certification in later proceedings. An award of the Adjustment Board probably could not be challenged by the parties, in a judicial proceeding for its enforcement, on the ground that the representatives were not properly chosen since this error would be irrelevant to the employee's rights.[10] On the other hand, the award of a board of arbitration under Sec. 7 is subject to attack through statutory review provided by Sec. 9, First, Second and Third. We construe the provision of Third (a) that the award may be impeached because "the proceedings were not substantially in conformity with this Act" to refer to the selection of bargaining representatives.[11] No other orders under the Act, legally binding on employees, spring from acts of bargaining representatives.[12]

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[10] Sec. 3(m), (n), (o), (p).

[11] 44 Stat. 577, 585, sec. 9:

"Third. Such petition for the impeachment or contesting of any award so filed shall be entertained by the court only on one or more of the following grounds:

"(a) That the award plainly does not conform to the substantive requirements laid down by this Act for such awards, or that the proceedings were not substantially in conformity with this Act; . . ."

That "proceeding" has such a meaning is strongly indicated by Sec. 7, First, which reads as follows:

"Sec. 7. First. Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in the preceding sections, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: . . ."

A binding arbitration brought about by improperly chosen representatives would be farcical.

[12] 44 Stat. 577, 586-7, as amended by 48 Stat. 1185, 1197, sec. 7:

"*Emergency Board.* Sec. 10. If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this Act and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however,* That no

The petitioners may not have an opportunity to impeach or contest an award of a board of arbitration reached after collective bargaining. The negotiations between the certified representative and the carriers may not require orders of the Adjustment Board or the board of arbitration. Mediation may compose the differences. Sec. 5. In such cases there is no opportunity for the petitioners to intervene. As a consequence the Switchmen's Union and its members are left without an opportunity specifically provided by the Act to contest the ruling of the Board of Mediation that the Act "vests the Board with no discretion to split a single carrier . . . for the purpose of determining who shall be eligible to vote for a representative of a craft or class of employees under Section 2, Ninth, of the Act, . . ." They exhausted their administrative remedy when they appeared before the Mediation Board. 303 U. S. 41, 50.

The members of the Switchmen's Union and the Union itself, in view of the fact that it was the bargaining representative of its members prior to this controversy (R. 79), have an interest recognized by law in the selection of representatives. *Texas & N. O. R. Co.* v. *Ry. Clerks*, 281 U. S. 548, 571. This right adheres to his condition as an employee as a right of privacy does to a person. This right is created for these employees by the Railway Labor Act and, in appropriate proceedings, a remedy, provided by the general jurisdiction of district courts, to test the extent of this right to select representatives follows from the creation of the right unless negatived by statute, withdrawal of jurisdiction or the like, when the right is claimed to be infringed. *Idem*, 569-70; *Virginian Ry.* v. *System Federation*, 300 U. S. 515, 543. The remedy may not be available to parties with a standing to enforce it because, for example, the infringement may be by governmental action without consent of the Government to be sued for a wrong committed by it. The fact that the remedy may come from the general jurisdiction of the courts rather than from the review provisions of the Act is not significant. We cannot conclude that because no statutory review exists no remedy for misinterpretation of statutory powers is left. No such presumption of obliter-

member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation."

ation of rights may be entertained. *A. F. of L.* v. *Labor Board*, 308 U. S. 401, 412; *United States v. Griffen*, 303 U. S. 226, 238; *Shannahan* v. *United States*, 303 U. S. 596, 603.

The Court in this case and in *General Committee of Adjustment of the Brotherhood of Locomotive Engineers for the Missouri-Kansas-Texas Railroad* v. *Missouri-Kansas-Texas Railroad Company, et al.*, decided today, gives as reasons for denying power to the courts to determine the meaning of the statute the history of federal railway labor legislation and the omission of any provision in this act for review of the determination of voting participants under Section 2, Ninth.

The history of this legislation is adequately stated in the opinions to which reference is made in the preceding paragraph. From their review of the successive enactments in this field, it is plain that until the 1926 act, the scheme for adjustment of railway labor disputes was without legal sanctions. In that act, Section 2, Third,[13] Section 9, Second,[14] providing for the enforcement of arbitration awards, and Section 10, authorizing emergency boards and forbidding changes in the conditions out of which the controversy arose for thirty days after the creation of an emergency board, established rights which were legally enforceable. The statute made the awards of Section 9 subject to judicial control but only a dictum of this Court as to Section 10 and judicial interpretation of Section 2, Third, provided judicial sanction to compel compliance with their provisions. *Texas & N. O. R. Co.* v. *Clerks*, 281 U. S. 548, 564, 566-70.

The 1934 Act was directed particularly at control over the initial step in collective bargaining—the determination of the employees'

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[13] 44 Stat. 577, 578, sec. 2:

"Third. Representatives, for the purposes of this Act, shall be designated by the respective parties in such manner as may be provided in their corporate organization or unincorporated association, or by other means of collective action, without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other."

[14] *Id.*, 585, sec. 9:

"Second. An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties."

representatives. Section 2, Ninth, here under examination, was an entirely new provision.[15] By the *Clerks* case, just cited, decided in 1929 and well known as a landmark of labor law, this Court had upheld judicial compulsion on the carrier to prohibit its interference in the selection of employee representatives even though there was no statutory authority for such judicial action.[16] Section 2, Ninth of the 1934 Act created by its terms a right in employees to participate in an election under the designation of the Board in accordance with the authorization of the statute. It was only natural therefore that Congress should assume that where its own creature, the Mediation Board, was charged with interference with the right of employees by a misconstruction of the statute under which it existed, that error of law would be subject to judicial examination to determine the correct meaning.

Nothing to which our attention has been called appears in the legislative history indicating a determination of Congress to exclude the courts from their customary power to interpret the laws of the nation in cases or controversies arising from administrative violations of statutory standards. No intention to refuse judicial aid in administration of the act is apparent. Attention was called just above to the criminal sanctions written into Section 2, Tenth. In addition provision is made in the act for judicial review of the orders of the National Railroad Adjustment Board, Section 3, First (p), and board of arbitration awards, Section 9, Third. Furthermore, the National Mediation Board has appeared in many court cases, as here, involving its certifications and so far as appears neither the parties nor the courts have questioned judicial

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[15] Other completely new sections were the "General Purposes" of Sec. 2 and Sec. 2, Fourth, Fifth, Seventh, Eighth and Tenth. By Tenth criminal sanctions were applied to compel carrier compliance with the commands of Fourth, Fifth, Seventh and Eighth. These subdivisions were concerned with the right of employees to organize and to choose freely their representatives.

[16] 281 U. S. 548, 569:

"The absence of penalty is not controlling. The creation of a legal right by language suitable to that end does not require for its effectiveness the imposition of statutory penalties. Many rights are enforced for which no statutory penalties are provided. In the case of the statute in question, there is an absence of penalty, in the sense of specially prescribed punishment, with respect to the arbitral awards and the prohibition of change in conditions pending the investigation and report of an emergency board, but in each instance a legal obligation is created and the statutory requirements are susceptible of enforcement by proceedings appropriate to each. The same is true of the prohibition of interference or coercion in connection with the choice of representatives. The right is created and the remedy exists. Marbury v. Madison, 1 Cranch, 137, 162, 163."

power.[17] The Board feels that such review has been profitable.[18] Against these later facts, the earlier reliance, prior to 1926, on voluntary action to enforce the railway labor statutes has little significance.

Nor in view of the statements and the decision in the *Clerks* case, do we think that the omission of statutory review from the provisions of Section 2, Ninth, is important. The requirement of that very subsection that "the carrier shall treat with the representatives so certified" was construed as an affirmative command open to judicial enforcement without specific statutory authority. *Virginian Ry.* v. *Federation*, 300 U. S. 515, 544.

Butte, A. & P. Ry. Co. v. *United States*, 290 U. S. 127, is cited as authority for a conclusion that delegation of an administrative duty carries to the appointee the authority to finally construe

[17] Railroad Trainmen v. National Mediation Board, 88 F. 2d 757; Railway Workers v. National Mediation Board, 110 F. 2d 529; Railway Conductors v. National Mediation Board, 113 F. 2d 531. See also Clerical Employees v. Railway Clerks, 85 F. 2d 152; Railway Clerks v. Virginian Ry., 125 F. 2d 853; Firemen & Enginemen v. Kenan, 87 F. 2d 651; Nashville, C. & St. L. Ry. v. Railway Employees' Dept., 93 F. 2d 340; Railway Clerks v. Nashville, C. & St. L. Ry., 94 F. 2d 97.

[18] Annual Report of the National Mediation Board, 1938, p. 5:

"The two cases decided by the courts clarifying the discretion vested in the National Mediation Board in connection with representation disputes both arose on the Nashville, Chattanooga & St. Louis Railway, and both were decided by the United States Circuit Court of Appeals for the Sixth Circuit. The first case, [*Nashville, Chattanooga & St. Louis Railway* v. *Railway Employes Department, American Federation of Labor*, 93 F. 2d 97] settled the issue concerning the right of furloughed employees retaining an employment status to vote in representation elections. The second decision [*Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, et al.* v. *The Nashville, Chattanooga & St. Louis Railway Co.*, 94 F. 2d 340] held that the National Mediation Board, when establishing eligible lists of voters and conducting elections in order to determine the representative of employees of a carrier by craft or class must do so with due regard for all of the facts, historical and otherwise, which have operated to shape the craft or class of employees on the carrier concerned as well as on railroads generally. Both decisions are very helpful to the Board in that they serve to settle issues which, in the past, have frequently arisen to trouble the orderly and prompt adjustment of disputes over representation between different factions among employees."

Id., 1942, p. 7:

"During the 8-year experience of the Board under the representation provisions of the law it is gratified to be able to report that in all but a few instances its actions in interpreting and applying these provisions of the law have been sustained by the courts. In all instances, however, the Board has benefited by court review and analysis of its actions and the facts of the disputes. The court rulings and opinions have clarified and settled many disputed points of the law and the Board's authority. Thus they constitute a valuable contribution in the solution of labor disputes."

the statute since such authority was "essential to the performance of the duty imposed upon the Commission" and since 'Congress did not provide a method of review,' the Government, as well as the carrier, was 'remediless whether the error be one of fact or of law.'" This was a case in which the Government ordered payments to carriers as compensation for deficits incurred during federal operation of the railways. It was determined that Congress intended to leave finally the determination of the beneficiaries to its agent, the Interstate Commerce Commission. This intention is far easier to deduce when the Congress is dealing with its own money than where it creates rights of suffrage for citizens to exercise for the improvement of their economic condition.

The *Virginian Railway* case presents a much closer analogy to the present controversy. As pointed out above, it dealt with the carrier's duty to "treat with" employees declared by Section 2, Ninth. Employees sought and obtained a judicial order directing the railroad to negotiate on the ground that new duties, requirements and rights were created "mandatory in form and capable of enforcement by judicial process." Despite the absence of statutory authority for court action it was held Congress intended legal sanction. A prohibition of negotiation, such as petitioners seek here, is, a fortiori, within judicial competence.[19]

One factor to test the intention of Congress, it is suggested in the M.K.T. opinion of today, is whether Congress was willing to crystallize the problem into "statutory commands." The statutory command for which determination is sought here is that the Board exercise its discretion. In the same opinion, it is said, "the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforcible in the courts should be implied."

[19] Compare Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381, 391, where this Court took cognizance of a suit seeking judicial review of administrative action without such authority in the statute under attack. See § 6, Bituminous Coal Act, 50 Stat. 85. Review was had under Judicial Code § 24(1) and 28 U. S. C. § 380(a).

relations rather than in that of statutory construction. Of course the judiciary does not make the administrative determination. "The functions of the courts cease when it is ascertained that the findings of the Commission meet the statutory test." *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 400. Likewise, the National Mediation Board may be conceded discretion to make any reasonable determination of the meaning of the words, "craft or class." Cf. *Gray* v. *Powell*, 314 U. S. 402. By requiring a plain sanction for a judicial remedy, the court authorizes the Mediation Board to determine not only questions judicially found to be committed to its discretion, as in *Gray* v. *Powell*, *supra*, but the statutory limits of its own powers as well. It seems more consonant with the genius of our institutions[20] to assume, not that the purpose to apply a legal sanction must be plain, but that in the absence of any express provision to the contrary, Congress intended the general judicial authority conferred by the Judicial Code to be available to a union and its members aggrieved by an administrative order presumably irreconcilable with a statutory right so explicitly framed as the right to bargain through representatives of the employees' own choosing.[21]

The petitioners assert their rights as rights arising under the Railway Labor Act, which is stated to be a law of the United States relating to interstate commerce. If this allegation is correct, and we think it is, there is jurisdiction of the subject matter of the suit under Judicial Code, section 24(8): "The district courts shall have original jurisdiction as follows: . . . Eighth. Of all suits and proceedings arising under any law regulating commerce." The general purpose of the act is to avoid interruption to commerce by prohibition of interference with the employees'

[20] An erroneous order of the Secretary of the Interior was similarly canceled when, without statutory authority, he struck the name of an enrollee from the rolls of an Indian Nation. This Court said: "But, as has been affirmed by this court in former decisions, there is no place in our constitutional system for the exercise of arbitrary power, and if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action." Garfield v. Goldsby, 211 U. S. 249, 262. Cf. Ness v. Fisher, 223 U. S. 683, 694. Compare Ickes v. Fox, 300 U. S. 82; West v. Standard Oil Co, 278 U. S 200, 220; Work v. Louisiana, 269 U. S. 250, 254.

[21] When Congress has intended to bar access to the courts, in whole or in part, it has understood how to express its determination. Emergency Price Control Act of 1942, sec. 204, 56 Stat. 23; chap. 335, 23 Stat. 350; sec. 4(b), 44 Stat. 828.

freedom of association and by provision for collective bargaining to settle labor disputes.[22] This regulates commerce.

The right to select representatives with whom carriers must bargain was created by the Act and the remedy sought here arises under that law. Since the cause of action "had its origin and is controlled by" the Railway Labor Act, it arises under it. *Peyton* v. *Ry. Express Agency*, 316 U. S. 350; *Mulford* v. *Smith*, 307 U. S. 38, 46; *Turner Lumber Co.* v. *C. M. & St. Paul Ry.*, 271 U. S. 259, 261; *Louis. & Nash. R. R. Co.* v. *Rice*, 247 U. S. 201.

Since the Court declines federal jurisdiction, it is useless to discuss either the merits or the other procedural questions such as jurisdiction in equity to grant the injunction requested, the power to vacate the order of the Mediation Board or the effect of the Norris-LaGuardia Act.

Mr. Justice ROBERTS and Mr. Justice JACKSON join in this dissent.

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[22] 48 Stat. 1185, 1187, sec. 2:

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." See note 5.